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E. ROBERT SEAVER, CLER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....

Appellant

VS

F..... O..... P.....

Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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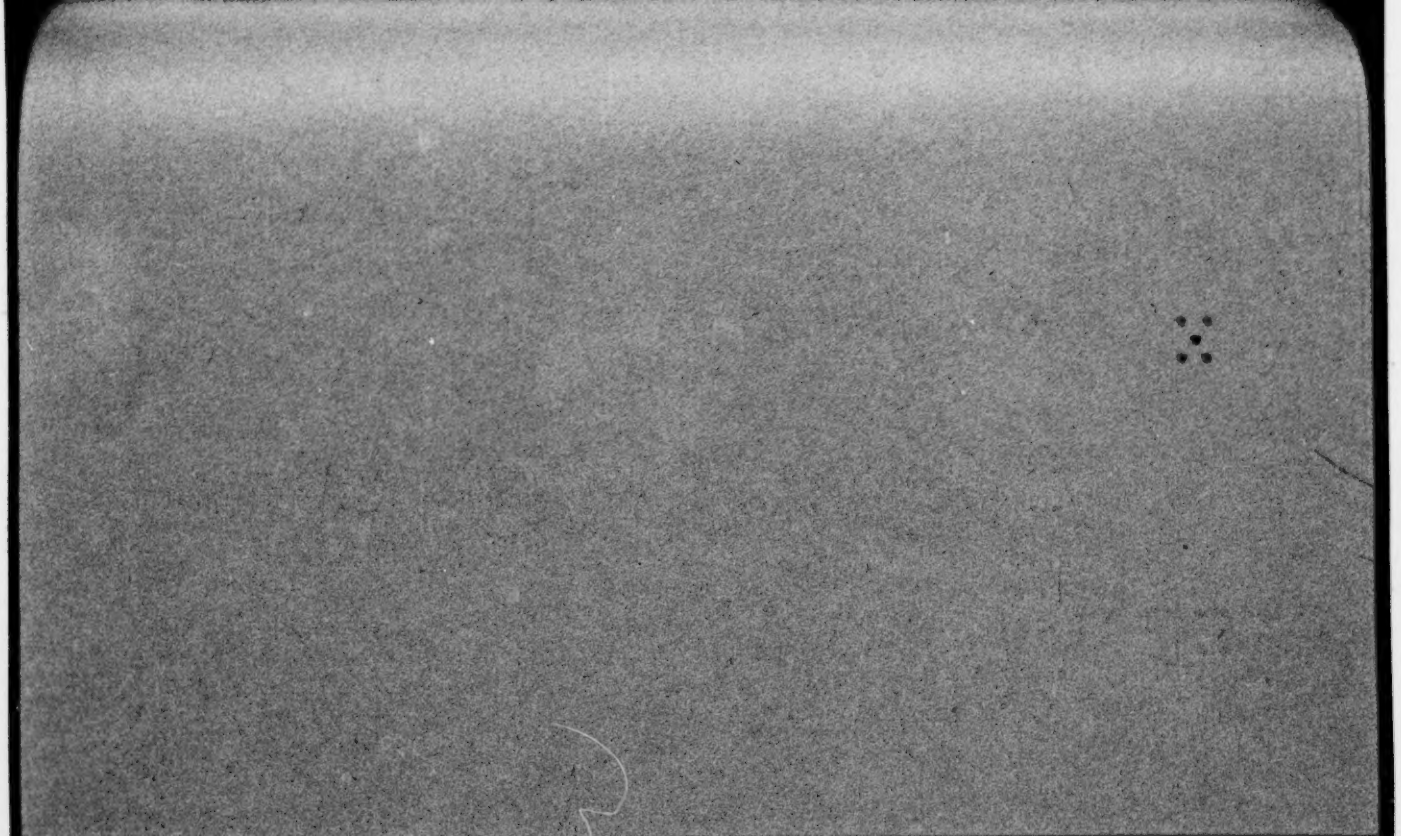

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....

Appellant

VS

F..... O..... P.....

Appellee

JURISDICTIONAL STATEMENT

Appellant, Linda Gomez, a twenty-four year old Mexican-American citizen, individually and as next friend of Zoraida Gomez, her two year old illegitimate daughter, appeals from the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas which was entered on March 10, 1971, rehearing denied April 7, 1971, discretionary review denied July 28, 1971, by the Supreme Court of Texas. These actions affirmed the judgment of the 150th District Court of Bexar County, Texas. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this Appeal, and that a substantial constitutional question is presented.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas are reported at 466 S.W. 2d 41, and are set out *infra* at pages 18

and 21 respectively. The Court of Civil Appeals wrote no opinion in denying the Appellant's Motion for Rehearing, but its endorsement on the face of Appellant's Motion for Rehearing overruling same is set forth *infra* at page 33. The Supreme Court of Texas wrote no opinion in denying discretionary review, but its notification denying the Application for Writ of Error is found at page 34, *infra*. The 150th District Court of Bexar County, Texas, wrote no opinion but the judgment of that court is found at page 37, *infra*.

JURISDICTION

(i) Appellant brought this action in the 150th District Court of Bexar County, Texas, asking that Francisco Ocasio Perez, Appellee, be found by the court to be the natural father of Zoraida Gomez and further asking the court to order the said Francisco Ocasio Perez to pay a reasonable amount of money for the support and maintenance of Zoraida Gomez during her minority. The 150th District Court of Bexar County, Texas, in its judgment entered on April 23, 1970, found Francisco Ocasio Perez, Appellee herein, to be the father of the minor child born out of wedlock but found that there was no civil liability on the part of Appellee to support said illegitimate child.

(ii) Appellant duly appealed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and that court affirmed the decision of the trial court on March 10, 1971, with Associate Justice Carlos C. Cadena dissenting. A timely application for rehearing was denied on April 7, 1971. Appellant then timely applied for Writ of Error to the Supreme Court of Texas asking for discretionary review but that Court refused the Writ finding "no reversible error" on July 28, 1971. Thus under Texas law on the 28th day of July, 1971, the judgment of the Court

of Civil Appeals became the final judgment of the highest court of the State available to Appellant. Appellant filed Notice of Appeal to the Supreme Court of the United States on August 26, 1971, with the Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

(iii) The jurisdiction of this Court to review by appeal the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas is conferred by 28 U.S.C. 1257 (2).

(iv) Cases which sustain the jurisdiction of this Court are:

(a) On the question of the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas being a final judgment of the highest court of Texas when the Supreme Court of Texas declines discretionary review by refusing the Application for Writ of Error finding "no reversible error": *Michigan-Wisconsin Pipe Line Co. v .Calvert*, 347 U.S. 157 (1954); *Bacon v. Texas*, 163 U.S. 207 (1896).

(b) Other cases sustaining the jurisdiction of this Court are: *Lake Erie and W. Ry. v. State*, 249 U.S. 422 (1919); *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938); and *Doty v. Love*, 295 U.S. 64 (1935).

(v) Appellant attacks the validity of civil statutes of the State of Texas contending they are unconstitutional insofar as they permit a legitimate child to require his father to support him while at the same time deny an illegitimate child the right to require his father to support him. The statutes together with judicial interpretation assailed herein are Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes, and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes.

STATUTES INVOLVED

The statutes involved are Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Article 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes. For the convenience of the Court the entire text of these statutes are set forth verbatin at pages 39 through 40, *infra*.

QUESTION PRESENTED

The courts of the state of Texas in construing and applying Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes, have ruled that there is no civil liability on the part of the natural father of an illegitimate child that would require him to contribute toward the support and maintenance of his illegitimate child as is required of the natural father of a legitimate child.

The question presented is whether Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes, are unconstitutional as violating the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States insofar as they permit a legitimate child to require support and maintenance from his natural father while denying an illegitimate child the right to require his natural father to support and maintain him.

STATEMENT OF THE CASE

I. WHEN AND HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW.

Appellant first raised the claim that Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Article 602 and 602, Texas Penal Code, Vernon's Annotated Texas Statutes were invalid as applied to Appellant for the reason that the are violative of the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States in the hearing on the merits of the case in the trial court. Notwithstanding Appellant's claim, the trial judge found that there was no civil liability on the part of a father to support his illegitimate child.

The same claim was again raised in Appellant's brief in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas. That court considered the issue and rejected Appellant's contention on the merits. Appellant preserved this point in her Motion for Rehearing in the Court of Civil Appeals which was denied. In her Application for Writ of Error to the Supreme Court of Texas Appellant again raised this point but the Court denied discretionary review.

II. FACTS

Appellant came before the trial court by means of a petition asking that Francisco Ocasio Perez, Appellee, be found by the court to be the natural father of Zoraida Gomez and further asking the court to order Appellee to pay a reasonable amount of child support for said illegitimate child during her minority. Appellant's petition is set forth at page 35, *infra.*

Appellant, Linda Gomez, testified that she first became acquainted with Appellee in June, 1968, at a party given by mutual

friends. At the time of their meeting, she was unmarried and Appellee told her he was also unmarried. In fact, Appellee was and remains lawfully married to someone else as of the date of the filing of this appeal. Thereafter, Appellant became intimate with Appellee and a child, Zoraida Gomez, was born of their relationship in June of 1969. The trial court found that Appellee was the natural father of Zoraida Gomez, the illegitimate child, and that Appellant was the natural mother. Further, the court found that the illegitimate child needed the support and maintenance of Appellee and that Appellee was able to give such support, and that he has refused and failed to do so. However, the trial court found that Appellee, the natural father of Zoraida Gomez an illegitimate child, has no civil liability to support said child.

THE QUESTION IS SUBSTANTIAL

This case presents the important constitutional question of whether Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statues, are unconstitutional as violating the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States insofar as they permit a legitimate child to require support and maintenance from his natural father while denying an illegitimate child the right to require his natural father to support and maintain him.

Appellant raises a substantial constitutional question effecting not only herself, but also thousands of other illegitimate children.[1]

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[1]Letter of Burton G. Hackney to Harry B. Adams, III, dated May 21, 1970, a copy of which is reproduced in the Appendix hereto infra at page 41.

In short this case is of substantial importance because it involves basic rights of large numbers of individuals who are being deprived of due process and equal protection of the law by being denied paternal support through the laws of the state of Texas.

Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes are invalid under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Appellant's sole complaint is that the Texas rule which, consistent with general governmental policy condemning children born out of wedlock to a second class way of life, deprives the illegitimate child of the right to paternal support which is accorded to legitimate children, and violates the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States

Appellant contends that, in connection with support, the legislature and the courts of Texas have ignored the constitutional mandate that illegitimates "are created equal" with legitimates, have not granted them "right and opportunity," and have failed to provide them "the equal protection of the laws."

"Unequal laws" are not necessarily forbidden by the equal protection clause. The question is whether a given piece of legislation operates "equally" upon all members of a group that is defined reasonably and in terms of a proper purpose.

The law fails to provide equal protection if it either:

a. Applies only to a part of a larger group that is similarly situated in relation to the purpose of the legislation, or
b. Brings into the group some individuals who are not similarly situated.

An example of each of the above two categories is found in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the law in question provided for sterilization of those who had committed grand larceny three times, with immunity for those who were embezzlers. It was under-inclusive in that it failed to include in the category embezzlers who were the same general type of offenders as robbers. It was over-inclusive in that not all habitual robbers are necessarily hereditary criminals.

The crucial determination to be made is whether the purpose of the grouping is proper. As stated in *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580 (1935).

> The ultimate test of validity is not whether foreing corporations differ from domestic but whether the differences between them are pertinent to the subject with respect to which the classification is made.

In Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1966), this Court stated:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes . . . It also imposes a requirement of some rationality in the nature of the class singled out . . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made' . . . To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination.

The mere fact that an exclusion from the force of a law applies to all members of a law applies to all members of a class, i.e., all illegitimates, is not sufficient to satisfy the consti-

tutional requirement of nondiscrimination if illegitimacy is not in in and of itself a legitimate classification. Legislation denying to the illegitimate rights that are granted to those of legitimate birth is acceptable only if it is related to a proper public concern with respect to which legitimate and illegitimate children are not situated similarly.

The purpose of the classification is highly important. If the purpose of the classification serves no useful legitimate public purpose, it is unconstitutional. As stated in Tussman & tenBroek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341, 358 (1949).

> Viewed in this light the prohibition against discriminatory legislation is a demand for purity of motive. It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility, or, alternatively, of favoritism, and partiality. The imposition of special burdens, the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the proscribed motives replace a concern for the public good as the purpose of the law, there is a violation of the equal prohibition against discriminatory legislation.

In cases involving economic interests, this Court has generally put the burden on those contesting the constitutionality of state law. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). However, where the "basic civil rights of man" are concerned, the burden is manifestly changed. *Skinner v. Oklahoma, supra.* Mr. Justice Douglas, speaking for the Court, said in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669-670 (1966):

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of

> equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change . . . . We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

Some classifications, such as those based on race or ancestry are constitutionally suspect and subject to the most rigid scrutiny, and may only be utilized if there clearly appears some overriding statutory purpose or compelling justification. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Oyama v. California*, 332 U.S. 633, 640 (1948); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

The law is well established that the color of a person's skin is not a proper or reasonable classification. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Nor according to well acquainted authorities in the domestic relations field, is illegitimacy. As stated by Professor Harry D. Krause in an excellent and thorough treatise entitled "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 at 489:

> There is no difficulty in establishing 'state action' as a source of the discrimination against illegitimates. While much of the bastard's problem may result from private discrimination, there is no doubt that it is state action when the illegitimate child does not inherit under the intestacy laws, when his statutory right of support is either non-existent or limited, or when he does not qualify under welfare laws.

The same author states at page 504 of this article:

> Fortunately for the illegitimate, his case for equal protection is strongest in the areas which are of the greatest practical

importance to him. While few illegitimates would gain from a provision for inheritance rights under the intestacy laws, many would beneft from an enlarged right of support.

As Justice Cadena observed in his dissent in the court below:

> . . . when a classification created by law is called into question, 'if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79 (1911), 55 L. Ed. 369, 31 S. Ct. 337. Even under this approach, which requires the exercise of maximum judicial self-restraint, the classification here under attack can be upheld only by freeing the judicial imagination to wander vagrant and unconfined, and indulging the naive assumption that by relieving a man of his obligation to support his illegitimate children, the law encourages him to withhold his sexual favors from women who are not willing to marry him. This assumption has no basis in human experience. If this fantasy is discarded, one must conclude that the discrimination against bastards with respect to the right to paternal support has its bases in prejudice rather than reason. 466 S.W. 2d 41 at 46 *infra* at 28.

We submit that illegitimacy is a "condition" and that there is discrimnation in Texas based on this "condition." A case involving "outcasts" is *Preisler v. Calcaterra,* 243 S.W. 2d 62 (Mo. 1951). The Supreme Court of Missouri, sitting en banc. held that the equal rights and equal protection clauses of the federal and state Constitutions made invalid a statute which arbitrarily limited to the two political parties the right to have challengers and watchers at the polls, and denied the right to the Socialist Party. We suggest that if the "outcasts" among political parties were entitled to equal protection with other political parties, the "outcasts" of the human race should be entitled to equal treatment with their more favored brethren, at least so far as the law of support by a father is concerned. In *Harper v. Virginia Board*

of Elections, supra, this Court in holding the Virginia poll tax invalid, stated: "Voter qualifications have no relationship to wealth nor to paying or not paying this or any other tax". Can it not be said just as effectively, children's qualifications for support have no relation to whether or not their father bothered to get a marriage license.

The basic unfairness of such discrimination is made manifest when it is realized that it is not only a discrimination against the illegitimate child, but is also a discrimination in favor of a legitimate child. For instance, if a father has a legitimate child and an illegitimate child, and the father must support only the legitimate child, the former will have a headstart in life by reason of better education, better social standing and a better supply of the necessities of life. Can there be any legal or moral reason why the illegitimate child, who had nothing to do with the circumstances of his birth, should be put in an inferior position in these matters by the law of the state of Texas? By stating that "all persons are created equal," is not the United States Constitution stating that all new born babies are in the same classification regardless of circumstances of their birth?

It seems clear that if about one third of the "poor" are illegitimate and thereby subject to discrimination under state and federal law, improving their social position depends at least in part upon a change in these laws. Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 506. The same author observed in another article that:

> Aside from the public aspects of illegitimacy, however, another battle is in progress in the private sector. Here, the purpose is to provide to the illegitimate those private resources that ought to be available to give him an even start in life. These resources are his parents, especially his father. *Bringing the Bastard into the Great Society — A Proposed Uniform Act on Legitimacy.* Harry D. Krause, 44 Tex. L. Rev. 829.

The recent decision of this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968) bears great similarity to the issues in this case. In the *Levy* case five illegitimate children filed suit in Louisiana district court for the wrongful death of their mother pursuant to the Louisiana wrongful death statute. The district court denied the relief sought holding that the wrongful death statute only authorized actions in behalf of legitimate children.

On appeal, this Court, in an opinion by Mr. Justice Douglas expressing the views of six members of the Court, held that since the illegitimacy of the children's birth had no rational relation to the nature of the wrong allegedly inflicted on their mother by the defendants, and since it was invidious to discriminate against the children where no action, conduct, or demeanor of theirs was possibly relevant to the harm that was done their mother, the equal protection clause of the Fourteenth Amendment was violated by denying them the right to maintain an action for their mother's wrongful death.

A portion of the language of this opinion is particularly appropriate at this point. *Levy, supra* at 71.

> In applying the equal protection clause to social and economic legislation, we give great latitude to the legislature in making classifications . . . . Even so, would a corporation, which is a 'person' for certain purposes within the meaning of the equal protection clause . . . be required to forego recovery for wrongs due its interest because its incorporators were all bastards?
>
> . . . . Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would. We conclude that it is invidious to discriminate against them

when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother.

If the reason for the classification in question is to prevent or preclude illegitimacy, then the force and focus of the law is directed at the wrong class of people. The illegitimate child has no control over his illegitimacy. He cannot prevent his own illegitimacy and when he passes puberty he becomes a member of another class of people. The class he now belongs to is a protected class and is unlike his former status of dependency. Now he is a member of a class whose inclination to breed illegitimate children is unfettered by any sanction or compulsion to do the right thing.

A companion case of *Levy v. Louisiana, supra,* was *Glona v. American Guarantee and Liability Insurance Company,* 391 U.S. 73 (1968). This case involved an action by a mother for the wrongful death of her illegitimate son; the United States District Court for the Eastern District of Louisiana granted the defendant's motion for summary judgment on the ground that Louisiana's wrongful death statute, while authorizing actions by the mother of legitimate children, did not authorize actions by the mother of illegitimate children.

Mr. Justice Douglas, expressing the views of six members of this Court, held that where the plaintiff in a wrongful death action is plainly the mother of the decedent, the State denies equal protection of the laws by withholding relief merely because the plaintiff's child, though wrongfully killed, was born to the plaintiff out of wedlock.

Since the opinions of this Court in *Levy* and *Glona, supra,* the Supreme Court of Missouri has considered and decided the very issue before this Court. This is especially important when one considers that *only* Texas, Idaho and formerly Missouri deny

an illegitimate child the support of his father. Note, St. Mary's Law Journal, Volume 1, page 146. In the case of R..... v. R ....., 431 S.W. 2d 152 (Missouri, 1968) the court held that illegitimate children have a right equal to that of legitimate children to require support by their father.

In the recent decision of this Court in *Labine v. Vincent*, ... U.S. ..... 28 L. Ed 2d 288, (March 29, 1971), Justice Black expressing the views of five members of the Court held that Louisiana's statutory scheme barring an illegitimate child, who had been acknowledged but not legtimated, from sharing equally with the legitimate heirs in the father's estate, had a rational basis in view of the State's interest in promoting family life and directing family life and the disposition of property within the State. This Court thus ruled that such statutory scheme did not constitute an invidious discrimination against illegitimate children in violation of the due process and equal protection clause of the Fourteenth Amendment.

This case is clearly distinguishable from the case at bar because as Justice Black points out in the Court's decision:

> We emphasize that this is not a case like Levy where the state has created an insurmountable barrier to this illegitimate child. ..... U.S. ....., 28 L. Ed. 288 at 294.

Here the state of Texas has created an "insurmountable barrier" to this illegitimate child because the State is denying the child the very sustenance necessary to pass without chaos and hardships from birth to adulthood. Nothing is more necessary for a child than support and maintenance by his father.

If the purpose of denying an illegitimate child the right to compel his natural father to support him when he is in need and want is to prevent moral decay or sin, then this is not an

accomplishment of that purpose. For every man knows, that under the laws of the state of Texas, he may spawn through and seed the entire State but if he does so without benefit of marriage, he is not responsible for the effects of his fecundity. It must fall to the burden of the State at large through its welfare agencies to take care of his responsibilities, for someone must care for a child in need.

How then is society protected if society must bear the burden of supporting the illegitimate child? We submit that the protection afforded by these laws is geared solely toward the individual malfactor and does not protect society at large. The law certainly does not protect the illegitimate child.

If the purpose and ends of the law and decisions of the courts are to punish the illegitimate child, then this must be viewed as an intolerable situation. The illegitimate is punished for an act over which he had no control, an act committed patently before his birth, and an act committed not by him but by two other people.

Appellant has attempted to raise very briefly the important constitutional issues presented by this case. Respectfully the Appellant wishes to direct the attention of the Court to the dissenting opinion of Associate Justice Carlo C. Cadena in the court below found at 406 S.W. 2d 43 and *infra* at page 21. Justice Cadena's opinion states Apellant's position in a precise and forceful manner. Appellant urges the Court to consider Justice Cadena's opinion as a part of this Statement for all purposes.

CONCLUSION

For the reasons stated, jurisdiction should be noted.

Respectfully submitted,

HARRY B. ADAMS, III

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APPENDIX

MAJORITY OPINION OF THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

L ..... G..... , Individually and As
Next Friend of Z..... G.....,
Appellant,

No. 14917, v.
F..... O..... P.....,
Appellee.

Appeal from Bexar County.

This is an appeal from a judgment declaring appellee to be the father of Z ..... G....., a minor child born out of wedlock, but decreeing that there is no civil liability on the part of appellee to support such child.

The only testimony in the record was by the mother of such child, who testified that she was unmarried when she met appellee at a party and had subsequently dated him; that as a result of this dating, a child had been born; that there is no doubt in her mind that appellee is the father of the child; that appellee is a married man, but that at the time of such dating, she did not know this. Appellee had legal representation in the early proceedings, and an answer was filed on his behalf, consisting of a general denial, and a plea in abatement asserting that no cause of action exists either by statutory or common law in Texas for the support of a minor child born out of wedlock.[1] Appellee's

1. Establishment of paternity is a prerequisite to allowing the court to establish a relationship between the child and the father upon which the illegitimate child could base his claim to support. The

attorney was given leave to withdraw as counsel prior to the trial of said cause, an appellee did not appear in said trial, either personally or by attorney.

Appellant asserts that such judgment denying such child the support of her father constitutes a denial of equal protection of law under the Fourteenth Amendment of the United States Constitution, and Article 1, Section 3, of the Texas Constitution, and is an unconstitutional discrimination contrary to law.

At common law, the father is under no legal obligation for the support and maintenance of his illegitimate children. Lane v. Philips, 69 Tex. 240, 6 S.W. 610 (1887); Beaver v. State, 96 Tex. Crim. 179, 256 S.W. 929 (1923); 10 Am. Jur. 2d Bastard Sesc. 68; 10 C.J.S. Bastards Sec. 18, page 86. The majority of the courts in this country have held that without legislation on the subject, the father of illegitimate child cannot be required to provide for its support. 30 A.L.R. Anno.—Illegitimate—Duty to Support 1069; 10 Am. Jur. 2d Sec. 68, supra; 10 C.J.S. Sec. 18, supra.

At the present time there is no Texas statute imposing on the father the duty to support and maintain an illegitimate child. We do not consider it the purpose of this opinion to debate the various sociological reasons for or against such legislation. Sufficient to say, the Family Law Section of the State Bar of Texas has recommended such legislation to both the 61st and 62nd Legislatures of the State of Texas. At the present time all but two states have such legislation. It must be recognized, however, that a

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Texas Constitution and the Texas Statutes nowhere provide for a "bastardy proceeding" to establish the paternity of the father. An act patterned after the Uniform Act on Legitimacy was submitted to the 61st Legislature in 1969; however, such proposed act did not become law. Such act would have established procedures for determination of paternity and provided for support of an illegitimate child. See Senate Bill No. 281; University of Texas; Krause, Proposed Uniform Act on Legitimacy, 44 Tex. L. Rev. 829 (1966); Mullin, Constitutional Law, 1 St. Mary's Law Journal 146, 149-150 (1969).

dominant feature of any type of legitimation statutes is the provision for proper standards and safeguards for determining the paternity of an illegitimate child.

The Texas Courts have uniformly held that a father is not under a common law or statutory duty to support his illegitimate child. See Lane v. Philips, supra; Beaver v. State, supra; 8 Tex. Jur. 2d Bastardy Sec. 13. The Supreme Court in Home of Holy Infancy v. Kaska, 397 S.W. 2d 208 (Tex. 1965), has recently reconsidered at length the rights and standing of the father of an illegitimate child. It was there said: "There are no similar statutes (legitimation) in Texas, and here a father is not under a common law or statutory duty to support his illegitimate child." In the face of this positive holding by our Supreme Court, the cases from other jurisdiction have little, if any, application. However, such holdings must be considered in the light of whether or not such jurisdiction has enacted some type of legitimation statute.

The trial court properly held that there was no cause of action in this State to impose civil liability on the part of appellee to support such illegitimate child. The judgment of the trial court is affirmed.

FRED V. KLINGEMAN
Associate Justice

Opinion delivered and
filed March 10, 1971

DISSENTING OPINION OF THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

L G , Individually and As
Next Friend of Z G ,

Appellant,

No. 14917, v.

F O P ,

Appellee.

Appeal from Bexar County.

Appellant's sole complaint is that the Texas rule which, consistently with the general governmental policy of condemning children born out of wedlock to a second class way of life, deprives an illegitimate child of the right to paternal support which is accorded to legitimate children, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The majority opinion notes appellant's contention and then proceeds to ignore it by applying, without effort to defend, the very rule of laws which appellant assails as unconstitutional.

Perhaps there was a time when the contention here made by appellant could be relegated to that class of arguments which courts consider too frivolous to merit discussion. But, at least during the past decade, there has been an increased concern with the validity, under the Equal Protection Clause, of governmental policies which discriminate against bastards.[1] Consideration of

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[1]Note, " 'Suitable Home' Tests Under Social Security: A Functional Approach to Equal Protection," 70 Yale L. J. 1192 (1961 is one of the earliest attempts to analyze classification based on legitimacy in the light of the Equal Protection Clause. The problem is discussed in Foote, Levy & Saunders, Cases on Family Law 72 (1966). Apparently,

the problem increased after the May 20, 1968, decisions by the Supreme Court of the United States in Levy v. Louisiana, 391 U.S. 68, 20 L. Ed. 2d 436, 88 S. Ct. 1509, and Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73, 20 L. Ed. 2d 441, 88 S. Ct. 1515, invalidating classifications based on illegitimacy found in a wrongful death statute[2]. Neither Levy nor Glona is mentioned by the majority.

Levy struck down the provisions of the Louisiana wrongful death statute which denied to a child born out of wedlock recovery for the wrongful death of his mother. In Glona, the Court invalidated a provision of the same statute which deprived a woman of the right to recover for the wrongful death of her illegitimate child.

Admittedly, the actual holdings in Levy and Glona do no more than equalize the position of legitimate and illegitimate children *vis-a-vis* their mother insofar as wrongful death claims against tortfeasors are concerned. The extension of the Levy and Glona decisions to eliminate all distinctions between legitimate and

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the first court to take note of the equal protection argument was the Supreme Court of Washington. After interpreting the Washington wrongful death statute as granting to both legitimate and illegitimate children to recover for the wrongful death of a parent, the court said: "Significantly, a very persuasive argument can be made that a decision contrary to ours would deny Appellant's daughter her Fourteenth Amendment right to equal protection of the laws, since there is no valid social reason, for purposes of welfare legislation, for distinguishing between members of the class 'illegitimate children' and other members of the broader class 'children' to which members of the more narrow class belong." Armijo v. Wesselius, 440 P. 2d 471, 474 (1968). The "very persuasive argument" referred to by the Washington Court is found in the article by Professor Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477 (1967).

[2]Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decision on Equal Protection and Paternity, 36 U. of Chi. L. Rev. 338 (1969); Gray & Rudovsky, The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee and Liability Ins. Co., 118 U. of Pa. L. Rev. 1 (1969); Comment, The Expanding Rights of the Illegitimate, 3 Creighton L. Rev. 135 (1970); Note, 21 Case W. Res. L. Rev. 292 (1970); Note, 54 Minn. L. Rev. 1336 (1970); Note, 44 Tul. L. Rev. 640 (1970).

illegitimate children in their relation with their mother is difficult to avoid and would work no significant alteration of the Texas law.[3]

However, the extension of Levy[4] to the relationship between an illegitimate child and his father would bring about profound changes in the status of the out-of-wedlock child, since most of the legal disadvantages under which such a child labors result from his legal relations, or, more precisely, the lack of such relations, with his father. But we are not here concerned with the validity of all rules regulating the relationship between a father and his illegitimate child. We need consider only the right to paternal support, which is, perhaps, the most important of the rights which the Texas law grants to a legitimate child and denies to a bastard. A denial of the right to paternal support has a greatly more serious effect on a child than does, for example, a denial of the right to bear his father's name.

Interestingly enough, the Supreme Court of Louisiana, on remand of Levy from the United States Supreme Court, assumed that the decision was not limited to the mother-child relationship.[5]

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[3]In Texas, such an interpretation of Levy and Glona apparently would work no substantial change in any of the important relations of an illegitimate child to his mother. In this state, the mother is entitled to custody of such a child and has the duty to support it. Even before the Levy decision, the Texas courts had held that a child born out of wedlock is entitled to recover for the wrongful death of his mother. American General Ins. Co. v. Alexander, 216 S.W. 2d 997 (Tex. Civ. App.—Beaumont 1948, writ ref'd). For the purposes of inheritance, an illegitimate child "shall be treated the same as if he were the legitimate child of his mother . . ." Tex. Prob. Code Sec. 42. Despite early statements to the effect that the term "children," as used in our workmen's compensation statutes, embraced only legitimate children, it is now held that an illegitimate child may recover compensation benefits for the death of his mother. 6 Tex. Jur. 2d, Workmen's Compensation, Sec. 58, p. 602.

[4]Only the Levy decision involved the rights of an illegtimate. Glona involved the rights of the mother of a child born out of wedlock. It is, therefore, believed that Levy is the more pertinent of the two decisions.

[5]Levy v. State of Louisiana, 216 So. 2d 818, 820 (1968).

With reference to the precise question before us, the highest courts of Ohio and Missouri have reached contradictory results.

The Ohio Supreme Court, by a 4-3 decision, concluded that Levy applied solely to "the intimate, familial relationship which exists between a mother and her child, whether the child is legitimate or illegitimate." Baston v. Sears, 15 Ohio St. 2d 166, 239 N. E. 2d 62, 63, n.* (1968). The Baston majority felt that a rule denying the right to paternal support to illegtimiate was merely a recognition of the nature of the obligation undertaken by the father at marriage. The marriage contract was viewed as including the promise by the husband to support the legitimate issue of the union. An illegitimate child, therefore, cannot claim a right of support against his father who has not consented to be bound. 239 N. E. 2d at 63-64.

The decision of the Missouri Supreme Court on the same question differs from that of the Ohio Court not only in the result reached, but also in the lack of dissent. The unanimous conclusion was simply stated: "The principles applied by the United States Supreme Court would render invalid state action which produces discrimination between legitimate and illegitimate children insofar as the right of the child to compel support by his father is concerned." R..... v. R....., 431 S.W. 2d 152, 154 (1968).

Apparently, the only other cases in which the highest court of a state has considered the problem of paternal support since the Levy decision is Munn v. Munn, 450 P. 2d 68 (1969, Colo.). There, the statute providing for the support of an illegitimate child by his father contemplated a judgment awarding damages against the father. The judgment in such a case was a final judgment, not subject to subsequent modification upon a showing of changed financial conditions. Since, under Colorado law, the father of a legitimate child has the right to reopen the case for the purpose of

having the amount lowered to reflect changed financial conditions. It was held that the denial of a similar right of the father of an illegitimate child was a denial to such father of the equal protection of the laws. By way of dictum, the Colorado Supreme Court added that the statute was equally objectionable from the viewpoint of the illegitimate child "for the jury verdict freezes his right to support from his father at a fixed level without regard to changing financial needs on his part." 450 P. 2d at 69.

It may be conceded, as the majority opinion here asserts, that it is not the purpose of that opinion "to debate the various sociological reasons for or against" the adoption of bastardy statutes. But, in view of the contention pressed upon us by appellant ,we cannot escape the task of analyzing the governmental purpose which is supposedly promoted by the rule which discriminates against illegitimate in the matter of the right to paternal support. When a state law is challenged under the Equal Protection Clause, the critical question concerns the existence of a rational nexus between the classification adopted and a valid governmental objective.[6] The issue is not whether the State of Texas may create a class composed of children born out of wedlock and subject the members of that class to less favorable treatment than that accorded to

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[6]"But classification must be reasonable, not arbitrary, and must rest upon some ground of different having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920), 64 L. Ed. 989, 40 S. Ct. 560. See generally, Tusman & tenBroek, The Equal Protection of the Laws 37 Calif. L. Rev. 341, 345-346 (1949).

The suggestion that a law is immune to constitutional attack if it applies equally to all persons within the statutory class has been rejected. "Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined . . ." McLaughlin v. State of Florida, 379 U. S. 184, 191 (1964), 13 L. Ed. 2d 222, 85 S. Ct. 283. Consequently, the fact that the Texas law deprives all illegitimate children of the right to paternal support is irrelevant to the consideration of the equal protection problem.

legitimate children, but whether there is a rational connection between such disparate treatment and the promotion of a legitimate governmental interest.[7] If the majority's unwillingness to "debate" implies that equal protection problems can be solved without discussion of the purpose, sociological or otherwise, which prompted placing of the members of a class in a legally disadvantageous position, then this Court today announces a novel approach to problems involving the Equal Protection Clause. To refuse to discuss the purpose of a discriminatory rule is to refuse to consider the claim of constitutional right.

The traditional arguments advanced in justification of laws discriminating against illegitimate children can be simply stated. It is said that the discrimination promotes morals and the general welfare because it (1) encourages marriage and deters extra-marital sexual relations; (2) prevents disruption of the family unit; and (3) allows a father to choose whether or not he will recognize the child.[8] It cannot be denied that the promotion of these ends is a legitimate governmental objective. But the problem here is whether the State of Texas has chosen a constitutional method of pursuing an undoubted state interest.

Even if we assume, closing our eyes to the soaring illegitimate birth rate, that a woman will refrain from illicit sexual activity in order to avoid bearing a child who will be denied paternal support, there is no basis for the conclusion that the Equal Protection Clause permits resort to this practice of vicarious expiation.[9] Nor can it be seriously contended that the governmental purpose of promoting

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[7]Tussman & tenBroek, op. cit., supra, n. 6, at 346.

[8]See Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 491-98 (1967). The Louisiana court in Levy emphasized the interest of the state in discouraging out-of-wedlock births and encouraging marriage. Levy v. State, 192 So. 2d 193, 195 (La. Ct. App. 1966).

[9]Krause, Equal Protection and Paternity, 36 U. of Chi. L. Rev. 338, 347, n. 34 (1969).

marriage and discouraging sexual promiscuity is promoted by a rule which guarantees to the rake immunity from liability for the support of the children born as a result of his extra-marital copulative performances.

The argument that compelling a man to support his illegitimate offspring would tend to destroy the family is singularly unpersuasive. There is nothing to indicate that the 48 states which have imposed such obligation on an illegitimate father have experienced a disruption of the family institution to an extent greater than the two states, including Texas, which deny the right to paternal support to illegitimates. The specious nature of the family protection argument is laid bare by the fact that freedom from the support obligation is not limited to married men. The same immunity is extended to illegitimate fathers who have no family to protect.

If preservation of the family unit is, indeed, the purpose of discrimnation against illegitimates in the matter of support, it is strange that the state shows no concern whatever for the stability of the legitimate family of the illegitimate mother, on whom the States of Texas places the obligation of support.[10]

It will be recalled that the Ohio court justified the difference in the support obligation owed by a man to his legitimate and illegitimate children on the theory that the legitimate father assumes, as an incident of the nuptial contract, the obligation to support the children of the marriage. Under the "consent" theory, the right of a legitimate child to paternal support is apparently a contractual right which he asserts as a third party beneficiary of the marriage contract.

The notion that a father is bound to support his legititimate children solely because he consents to do so assumes that children

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[10]May the illegitimate mother complain that she is denied the equal protection of the laws because her obligation to her illegitimate child are substantially greater than those imposed on the man who was her partner in the socially disapproved procreative act?

owe their right to support to the existence of marriage. In fact, marriage owes its existence to the necessity that children be supported.[11] The fictitious nature of the consensual nature of the father's support obligation is apparent. The obligation to support legitimate children would exist even if the man, during the marriage ceremony, expressly stated, with the full acquiescence of the bride, that he did not assume such obligation. If such a repudiation is ineffective, then consent is irrelevant. "Implied consent," then, is a misnomer. The obligation is imposed by law, irrespective of consent.

It is recognized that when a classification created by law is called into question, "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 79 (1911), 55 L. Ed. 369, 31 S. Ct. 337. Even under this approach, which requires the exercise of maximum self-restraint, the classification here under attack can be upheld only by freeing the judicial imagination to wander vagrant and unconfined, and indulging the naive assumption that by relieving a man of his obligation to support his illegitimate children, the law encourages him to withhold his sexual favors from women who are not willing to marry him. This assumption has no basis in human experience. If this fantasy is discarded, we must conclude that the discrimination against bastards with respect to the right to paternal support has its basis in prejudice rather than reason.[12]

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11 I Westermark, History of Human Marriage, 72 (1921).

12 "The bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undesirable evidence of contra-moral forces; in short, a problem as old and involved as human existence itself." Davis, Illegitimacy and the Social Structure, 45 Am. J. of Sociology 215 (1939).

The classification here is characterized by a general illsuitedness to the advancement of any proper governmental interest. It is highly adaptable to uses which are oppressive in the sense of systematic and unfair devaluation of the claims of certain persons to substantial equality of treatment. It possesses a potency to injure and stigmatize the disadvantaged class by implying popular or official belief in their inherent inferiority or undeservedness. It penalizes a class of persons solely because of conditions which are wholly beyond their control and which result from the conduct of third parties occurring before the penalized persons came into existence. These are the hallmarks of "invidious" discrimination.

The opinion by the Texas Supreme Court in Home of Holy Infancy v. Kaska, 397 S.W. 2d 208 (1965), does not support the refusal by this Court to consider appellant's equal protection contention. Kaska contains no discussion of the constitutional problem, and the opinion in that case precludes the inference that the highest tribunal of this state had its attention called to the equal protection question.

The fact that Texas has not adopted a bastardy statute is not pertinent. In fact, it is the policy of the state in depriving illegitimates of the right to paternal support which explains appellant's presence here. Nor is it true that it "must be recognized . . . that a dominant feature of any type of legitimation statutes is the provision for proper standards and safeguards for determining the paternity of an illegitimate child." The Texas legitimation statute contains no such provisions. "Where a man, having by a woman a child or children shall afterwards intermarry with such woman, such child or children shall thereby be legitimated and made capable of inheriting his estate." Tex. Ann. Prob. Code Sec. 42. No procedure is established for the purpose of determining whether a man who marries a woman who has conceived and given birth to a child out of wedlock is, in fact, the father of the child. In any event, a constitutional right is not dependent for its existence on state

action establishing a specific procedure for the ascertainment of the facts on which the constitutional claim is based. The vagaries of local practices cannot be allowed to prevail over a constitutional right. Gouled v. United States, 255 U. S. 298, 313 (1921), 65 L. Ed. 647, 41 S. Ct. 261. If an illegitimate child has a constitutional right to paternal support, then, under Article 1, Sec. 13 of the Texas Constitution, the legislature is powerless, either by affirmative action or by failure to act, to destroy his cause of action by depriving him of a forum. Middletin v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556 (1916).

The difficulty of ascertaining paternity, in the absence of the strong presumption of legitimacy in the case of a child born in wedlock, presents no obstacle to recognition of the claim of an illegitimate child. The fact that recognition of a right may lead to the assertion of groundless charges is not a sufficient reason for refusing to recognize the existence of the right. Relief, of course, will be granted only in those cases where paternity is established.[13] Here, the trial court found as a fact that appellee is the father of the child in question. Appellee has not challenged the sufficiency of the evidence to support this finding.

CARLOS C. CADENA
Associate Justice

Dissenting Opinion filed
and delivered March 10, 1971

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[13]The approach that recovery will be denied in the absence of proof but will be granted in the presence of proof has been denounced as being "altogether too simplistic." Jerry Vogel Music Co. v. Edward B. Marks Corp., 425 F. 2d 834, 836, n. 4 (2d Cir., 1969). Cf: "It is . . . to be observed that the argument against allowing such an action because groundless charges may be made is not a good reason for denying recovery. If the right to recover for injury resulting from the wrongful conduct be defeated whenever such dangers exist, many of the grievances the law deals with would be eliminated. That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs . . . ." It is the function of courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform." Samms v. Eccles, 11 Utah 2d 299, 358 P. 2d 344, 347 (1961).

APPELLANT'S NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NO: 14,917

IN THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....,

Appellant

VS

F..... O..... P.....,

Appellee

NOTICE OF APPEAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Notice is hereby given that, Linda Gomez, individually and as next friend of Zoraida Gomez, appellant in the above styled cause, hereby appeals to the Supreme Court of the United States from the final order and opinion of this Court rendered on March 10, 1971, and from final order of the Supreme Court of Texas of July 28, 1971, refusing Application for Writ of Error, finding no reversible error

This appeal is taken pursuant to 28 United States Code Section 1257 (2).

Respectfully submitted,

HARRY B. ADAMS, III
DONNIE J. MCMANUS
Attorneys for Appellant
203 West Nueva Street
San Antonio, Texas 78207

By /s/ .....

CERTIFICATE OF SERVICE

I, Harry B. Adams, III, one of the attorneys for the appellant, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 26th day of August, 1971, I served a copy of the foregoing Notice of Appeal on the appellee, by depositing a copy in the United States Mail, First Class, Certified, Return Receipt Requested, postage prepaid, addressed to Francisco Ocasio Perez, Company B, 1st Bn. 41 Inf. Mech., Fort Hood, Texas. Therefore all parties have been served.

/s/

HARRY B. ADAMS, III
Attorney for Appellant

FACE OF APPELLANTS MOTION FOR REHEARING IN THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS, ON WHICH APPEARS NOTATION OF THE COURT OVERRULING SAID MOTION.

NO: 14,917

14917

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL
DISTRICT OF TEXAS

LINDA GOMEZ, INDIVIDUALLY AND AS
NEXT FRIEND OF ZORAIDA GOMEZ,
Appellant

B-2719
A2380 VS.

FRANCISCO OCASIO PEREZ,
Appellee

APPEAL FROM THE DISTRICT COURT
ONE HUNDRED FIFTIETH JUDICIAL DISTRICT
OF BEXAR COUNTY, TEXAS

Overruled
S.V.K.
CWB.

APPELLANT'S MOTION FOR REHEARING

FILED
In the Court of Civil Appeals
AT SAN ANTONIO, TEXAS

MAR 22 1971

Robert L. Cook
CLERK

HARRY B. ADAMS, III
ROYAL K. GRIFFIN
203 West Nueva Street
San Antonio, Texas 78207
(512) 227-0111

Attorneys for Appellant

NOTIFICATION FROM THE SUPREME COURT OF TEXAS REFUSING WRIT OF ERROR, "NO REVERSIBLE ERROR"

CLERK'S OFFICE—SUPREME COURT

Austin, Texas, July 28, 1971

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of GOMEZ v. PEREZ, No. B-2719, was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

PLAINTIFF'S ORIGINAL PETITION
TRIAL COURT

NO. F-215903

LINDA GOMEZ, individually and as next friend of ZORAIDA GOMEZ	IN THE DISTRICT COURT 150th JUDICIAL DISTRICT
VS.	BEXAR COUNTY, TEXAS
FRANCISCO OCASIO PEREZ	

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the plaintiff, Linda Gomez, individually and as next friend of Zoraida Gomez, complaining of the defendant, Francisco Ocasio Perez, and respectfully shows the Court the following:

I.

Plaintiff, Linda Gomez, and Zoraida Gomes are actual bona fide residents of San Antonio, Bexar County, Texas. Defendant, Francisco Ocasio Perez, is a resident of San Antonio, Bexar County, Texas, and may be served with citation at Fort Hood, Killeen, Texas where he is a Sergeant.

II.

Plaintiff would show the Court that Francisco Ocasio Perez is the natural father and that she Linda Gomez is the natural mother of Zoraida Gomez, who was born June 13, 1969, in Bexar County, Texas. Plaintiff would also show that said child was conceived in San Antonio, Bexar County, Texas.

III.

Plaintiff, Linda Gomez, would show the Court that she is a proper person to have the care, custody and control of said minor child, Zoraida Gomez, and that she is in great want and need and without means to adequately support said minor child and that the defendant should be required to pay not less than $50.00 per week for the support of said minor child.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that defendant be cited to appear and answer herein as provided by law and that upon the hearing of this case on its merits that the defendant be declared to be the father of Zoraida Gomez, a female born June 13, 1969; that she the plaintiff, Linda Gomez, be awarded the care, custody and control of said child, Zoraida Gomez; that defendant be declared legally obligated to support said minor child and that defendant be ordered to pay a reasonable amount of support and maintenance for the minor child; plaintiff further prays for such other relief both general and special in law and in equity to which she may show herself justly entitled.

LINDA GOMEZ—Plaintiff

HARRY B. ADAMS, III
Attorney for Plaintiff
203 West Nueva Street—3rd Floor
San Antonio, Texas 78207

FILING: FILED
ELTON R. CUDE
DISTRICT CLERK, BEXAR CO., TEXAS
1969 SEP 18 PM 4:02
DEPUTY
BY MOLLIE OVIEDO

FINAL JUDGMENT OF THE TRIAL COURT
NO: F-215,903

LINDA GOMEZ,
INDIVIDUALLY AND
AS NEXT FRIEND OF
ZORAIDA GOMEZ
VS
FRANCISCO OCASIO PEREZ

IN THE DISTRICT COURT
150th JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

FINAL JUDGMENT

On this the 23rd day of March, 1970, came on to be heard the above styled and numbered cause, came the plaintiff in person and by her attorney, and the defendant, although duly and timely notified of this hearing by service upon his attorney, failed to appear. The Court after considering the notice to the defendant found that it was duly and timely given and in accordance with all legal requirements, and proceeded to hear the case on the merits. The Court after hearing the pleadings read, the evidence and the arguments of plaintiff's attorney, finds that this Court has jurisdiction to hear this suit, that Linda Gomez is the mother and Francisco Ocasio Perez, the defendant herein, is the father of Zoraida Gomez; that Zoraida Gomez was born out of wedlock, that at the time Zoraida Gomez was conceived through the present time Francisco Ocasio Perez was not married to Linda Gomez but was married to another person. The Court further finds that Zoraida Gomez needs the support and maintenance of her father but that the defendant though able to furnish such support has failed and refused to do so. The Court further finds there is no civil liability on the part of a father to support an illegitimate child.

Is it therefore ORDERED, ADJUDGED and DECREED by the Court that the relief sought herein is in all things denied.

To which judgment of the Court plaintiff duly and timely in open Court gave notice to appeal.

SIGNED this 23rd day o April, 1970.

Judge Presiding

APPROVED:

HARRY B. ADAMS, III
Attorney for Plaintiff
203 W. Nueva Street
San Antonio, Texas 78207

ENTRY: Recorded in Volume 117A, at pages 223 and 224 Minutes of the 150th Judicial District Court

RENDERED: April 23, 1970

ARTICLES 602 and 602A, VERNON'S ANNOTATED PENAL CODE

Desertion of wife or child

Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years. As amended Acts 1959, 56th Leg., p. 504, ch. 222, Sec. 1.

Subsequent convicted for desertion of wife or child; leaving state

Any husband who has been convicted of the misdemeanor offense of deserting, neglecting or refusing to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who has been convicted of the misdemeanor offense of deserting, neglecting, or refusing to provide for the support and maintenance of his or her child or children under eighteen years of age, and who shall thereafter wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall for each and every subsequent such violation be guilty of a felony; any husband who shall wilfully desert, neglect, or refuse to provide for support and maintenance of his wife who may be in necessitous circumstances, or any husband who shall wilfully desert, neglect, or refuse to provide for the support and maintenance of his child or children under eighteen years of age, and who shall desert said wife or children by leaving the State of Texas and by going into some other state, shall be guilty of a felony; and upon conviction shall be punished by

confinement in the County Jail not less than ten days nor more than two years, or by confinement in the State Penitentiary for not more than five years. Added Acts 1595, 56th Leg., p. 504, ch. 222, Sec. 1.

SECTION 4.02, CHAPTER 4, OF THE TEXAS FAMILY CODE

Duty to Support

Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife, and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed.

LETTER OF BURTON G. HACKNEY TO HARRY B. ADAMS, III, DATED MAY 21, 1970

APPENDIX

STATE DEPARTMENT OF PUBLIC WELFARE

...
...
...ILLSBORO
...ALL BAKER
...MAN, HOUSTON
...SARAZAN
...ON, FORT WORTH

BURTON G. HACKNEY
COMMISSIONER

HERBERT C. WILSON
DEPUTY COMMISSIONER

JOHN H. REAGAN BUILDING

AUSTIN, TEXAS 78701

May 21, 1970

...Harry Adams
...torney at Law
...ar County Legal Aid Association
...W. Nueva
...Antonio, Texas 78207

RE: Amicus Curiae Brief

...r Mr. Adams:

...your telephone call to Miss Lane requesting the Department to consider the possi...ity of asking the Attorney General to write an Amicus Curiae Brief for the Depart...t in the suit involving the establishment of paternity and securing of support on...alf of children born out of wedlock, you also requested some statistical data.

...are enclosing a copy of our letter to the Honorable Crawford Martin, Attorney ...eral. You will note from your copy of that letter we are asking that you supply, ...ectly to his office, the style and status of your case and whatever additional ...rmation he may need. We are also furnishing you the tabulation as to the number ...families, number of children, and amounts of payments in the AFDC program for the ...lve months beginning May, 1969 through April, 1970.

...do not have available information which will show the amount of assistance paid o...alf of illegitimate children. However, in November, 1967, an AFDC study was made ...ch showed that 23.8% of the children on the rolls were illegitimate.

...quarterly tabulation (A-337) from Automatic Data Processing for the month ending ...ch 31, 1970, shows 52,136 or 28.8% illegitimate children. This is the number of ...ldren with the code for unmarried parent entered on Forms 1-A and 1-B.

...trust that this information will be of some assistance to you.

Sincerely yours,

Burton G. Hackney

...eel
...closures
...Honorable Crawford C. Martin